IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

ANNIE MOORE, as administratrix of the goods, chattels and credits of William J. Simpson, deceased,
Petitioner,
against
ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

PRELIMINARY STATEMENT.

The opinions below, the statement of the matter involved and the questions presented appear in that petition for a writ of certiorari herein and in the interest of brevity are incorporated here by reference.

II.

SUMMARY OF ARGUMENT.

POINT I.

This case should have been decided in accordance with the law of the State of New York and the burden is placed upon this Court to determine how the Court of Appeals of that State would have ruled on the proposition here presented.

POINT II.

Where a conflict of law was involved in a case where a suit was decided by the highest court of North Carolina in an action to recover for death occurring in another State, the highest court of North Carolina construed the statutory limitation of the foreign State, not as a condition precedent, but as a mere statute of limitation and applied the North Carolina statutory limitation as the law of the forum.

POINT III.

Had the motion to dismiss been made in the case at bar while the action was pending in the State of New York, it is submitted that the Courts of such State following the public policy of that State, and in view of the North Carolina decision in *Tiffenbraun vs. Flannery*, 198 N. C. 397, would have applied the law of the forum holding under the facts of this case the North Carolina statute to be merely one of limitation and not

a condition precedent and applied the New York State two-year limitation and would have denied the motion to dismiss.

III.

ARGUMENT.

POINT I.

This case should have been decided in accordance with the law of the State of New York and the burden is placed upon this Court to determine how the Court of Appeals of the State would have ruled on the proposition here presented.

Erie Railroad Company vs. Tompkins, 304 U. S. 64, 82 U. S. Law Ed. 1188.

POINT II.

Where a conflict of law was involved in a case where a suit was decided by the highest court of North Carolina in an action to recover for death occurring in another State, the highest court of North Carolina construed the statutory limitation of the foreign State, not as a condition precedent but as a mere statute of limitation and applied the North Carolina statutory limitation the law of the forum.

Tiffenbraun vs. Flannery, 198 N. C. 397, 151 S. E. 857, 68 L.R.A. 210.

In that case the death occurred in the State of Florida, where there was a statute providing that the action should be brought in two years. The suit was brought in North Carolina against the defendant, a resident of North Carolina, more than a year after the death but within the two-year period. The North Carolina Court dismissed the action on the ground that comity and the public policy of North Carolina did not permit the plaintiff to have the advantage of the Florida two-year statute to the detriment of a citizen of North Carolina where limitation was one year. In other words, although as shown by the opinion in that case the general rule of construction established in North Carolina was to the effect that the limitation in its statute was a condition precedent, notwithstanding *the Court also construed similar provisions in foreign states as mere statutes of limitation where conflict of law was involved and applied the rule of the forum for the benefit of the North Carolina citizens.* Whatever theories may be advanced, it is submitted that it is extremely illogical to hold that a time limitation is a part of the cause of action and at the same time to hold that a citizen of Florida does not take that part of the Florida cause of action or statute with him when he sues in North Carolina.

The Federal Courts have referred to this inconsistency of construction.

Theroux vs. Northern Pacific R. R. Co., 64 Fed. 84, 12 C.C.A. 52.
Keep vs. National Tube Company, 154 Fed. 121.

Those Federal cases clearly point out that if a provision of a death statute with reference to time is a part of the cause of action, the plaintiff suing by virtue of the statute should be deemed to take the time limitation as a part of the cause of action with him into a foreign jurisdiction, even if the limitation under the statute in that jurisdiction has expired. In other words, the North Caro-

lina Court in the *Tiffenbraun* case should have recognized the two-year time limitation of the Florida statute as a condition of the cause of action and in refusing to do so violated proper rules of comity. The Court said in the *Theroux* case, *supra,* at page 86:

> "It follows, of course, that if the courts of another State refuse to permit the cause of action to be sued upon during a part of the period limited by the foreign law to the extent they refuse to give effect to the foreign law and by so doing impair the right intended to be created."

This impairment of the right created by the foreign statute can only be done on the theory adopted by the North Carolina Court in the *Tiffenbraun* case, viz: *by treating the time limitation as a mere statute of limitations and thereby applying the rules of the forum with reference to the time limitation.* That is exactly what the North Carolina Court did in the *Tiffenbraun* case. This is shown by the head note to that case, which reads as follows at page 210 of 68 L.R.A.

> "Conflict of Laws. The time within which suit on a cause of action for wrongful death must be brought *is determined by the laws of State in which suit is brought rather than of the State in which the cause of action accrued.*"

Under that doctrine the law of the New York forum the two-year statute would be applicable here. *That the Court in the North Carolina case treated the time limitation as a mere statute of limitations, where there was a conflict of law,* is further shown by this other head note construing the *Tiffenbraun* case in 68 L.R.A. 210.

> "Statutes of limitation are procedural in nature and working upon the remedy govern the cause of action in the particular forum in which such cause of action is asserted."

Returning to *Tiffenbraun vs. Flannery, supra*, it clearly appears in the opinion of the North Carolina Court therein that the Court was treating the limitation period in the Florida statute, although the same is in language similar to the North Carolina statute as a statute of limitation (p. 404 opinion). To give the Florida statute any other effect the North Carolina Court said would be contrary to the public policy of the State of North Carolina *and that, therefore, it would apply the law of North Carolina to suits brought in that State with reference to the time period instead of the law of the State creating the cause of action.*

The North Carolina Court said (p. 404):

> "All statutes of limitation are essentially time clocks and while Cons. Stat. 160 has been construed as a condition annexed to the cause of action *it is also a time limit to the procedure.*"

That the highest court in North Carolina treats these provisions dependent upon the facts and circumstances *both* as a condition precedent and as a statute of limitation is also shown by the head note to the official report of *Tiffenbraun vs. Flannery,* 198 N. C. 397.

It is no answer to the foregoing argument to assert that if the time limitation in the North Carolina statute is a condition precedent the cause of action is extinguished within one year and cannot be given effect in the State of New York in accordance with the law of that forum. As pointed out in the Federal cases hereinbefore cited, if the limitation is treated as a condition precedent it should accompany the cause of action into a foreign jurisdiction even under circumstances where the limitation of the foreign jurisdiction is more than the limitation of the statute in the jurisdiction where the suit is instituted.

If the North Carolina one-year limitation be considered a mere statute of limitation under the special facts of this action, concededly the New York two-year limitation—the *lex fori* prevails and the order appealed from should be reversed.

Was it open to the New York Courts under the facts of this case to so treat the North Carolina limitation as a mere statute of limitations?

Concededly the Courts of North Carolina have treated the one-year limitation as *both* a mere statute of limitation and as a condition annexed to the cause of action. In any particular action it must be one or the other and cannot be both in the same action. With this double treatment of the limitation it being considered by the North Carolina Courts as now a condition annexed to the cause of action and again a mere statute of limitation it was open to the New York Courts to construe *Tiffenbraun vs. Flannery,* 198 N. C. 397-68, Am. L.R.A. 210, as having treated the North Carolina limitation as a mere statute of limitations under the facts of the present action.

While it is true that in the *Tiffenbraun* case the cause of action arose in Florida, the North Carolina Court was nevertheless applying and construing the North Carolina statute and in applying it to that action *could only apply it as a statute of limitations* of the *lex fori* not as a condition annexed to the Florida action.

It was claimed by respondent that the decisive factor leading the North Carolina Court in the *Tiffenbraun* case to employ the North Carolina limitation as a mere statute of limitation of the forum was a stipulation of the parties that the Florida limitation was a mere statute of limitations not contained in the body of the Florida Death Act. True, such a stipulation was made but the

North Carolina Court *did not make it the basis of its decision,* but took the occasion to announce a general policy that the North Carolina limitation would apply and that even if a longer limitation was fixed and held by the statute or decisions of another state where the accident occurred to be a condition annexed to the foreign cause of action the North Carolina Courts would treat such condition precedent of the foreign statute as a mere statute of limitations in any action on the foreign statute in North Carolina and apply the shorter North Carolina period as the statute of limitations of the forum for the protection of the North Carolina citizen.

The reason was thus explained by the Court as a matter of North Carolina legislative policy (p.):

> "Certainly it is not to be supposed that the legislative department intended to confer upon non-residents more extensive rights in the Courts than accorded to citizens of this State."

Thus, if we assume that the New York two-year limitation had been held in that state a condition annexed to a death claim arising in that state the scope of the *Tiffenbraun* opinion is that in an action on such a claim in North Carolina against a citizen of the latter state the North Carolina Court would disregard the New York ruling and consider the limitation of the foreign statute a mere statute of limitations and apply the shorter period of the North Carolina statute as the law of the forum.

Such being the North Carolina rule why was it not open had this case remained in the New York Courts for those Courts to treat the North Carolina limitation as a mere statute of limitations and apply the longer New York period for the benefit of the New York citizen and as the law of the forum?

While the interpretations of text writers and annotators are not conclusive in the construction of Court decisions and opinions, they are perhaps of more weight, being impartial, than the offered constructions of counsel and it is for that reason that we here fortify our view of the scope of the *Tiffenbraun* opinion with the similar construction of the annotator in Am. L.R.A. He says, 68 Am. L.R.A.:

> "It is to be noted that the Florida statute of limitations was a general statute and was not embraced in the statute creating the cause of action *but in order to discuss, as the Court did, the question under consideration it must have been assumed by the Court that the Florida statute was a condition annexed upon the cause of action itself.*"

Was it not at the very least open to the New York Courts to adopt the construction of the *Tiffenbraun* case given by the Am. L.R.A. editor? Is it not reasonably probable that the New York Courts would have adopted that construction? If it is reasonably debatable whether the New York Courts would have adopted that construction, should not the Federal Court under the doctrine of *Erie Railroad Company vs. Tompkins,* 304 U. S. 64, have given the benefit of that possibility to appellant and reversed the order of the District Court?

There is nothing in the cases cited by respondent below to establish that the New York Court of Appeals would not have adopted the construction of the *Tiffenbraun* case here claimed. In none of those cases had the highest court of the foreign statute ever announced a legislative or state policy to treat the limitation of a foreign statute where the cause of action arose as a mere statute of limitation regardless of whether it was deemed a condition precedent in such foreign state. In none of such cases had the foreign state where the cause of action

accrued announced the policy of applying its own statute of limitations when to the advantage of its citizen defendant in a death caused in a foreign state. We submit that a precisely analogous situation to that in the case at bar has not been presented to the New York Courts —nor any case where the New York Courts have had to consider the effect of an announced general policy such as that stated in the *Tiffenbraun* case.

That the New York Court of Appeals would if reasonably possible or plausible adopt such construction as would consider the North Carolina limitation as a mere statute of limitation is shown by the fact that the New York death limitation although contained in the New York death statute is deemed a mere statute of limitation.

Sharrow vs. Inland Lines, 214 N. Y. 101.

The entire policy of New York State and its Courts has been to treat these death action limitation periods as not conditions annexed to the action *wherever it has been possible to do so* (see pp. 13-17 main brief).

It is only where some expressly and specifically positive language of the foreign statute has precluded the Court of Appeals from so doing that it has not treated the foreign limitation as a mere statute of limitations. Such was the phrase "but *only* within a year" (*Sharrow vs. Inland Lines,* 214 N. Y. 101, page 108), and the positive words in the New Jersey statute *"and not thereafter"* (*Schwertfeger, as admrx., vs. Scandinavian Am. Line,* 186 App. Div. 69, affirmed 226 N. Y. 696—see N. Y. State Ann. 2:47). There is no such analogous words in the North Carolina statute.

POINT III.

Had the motion to dismiss been made in the case at bar while the action was pending in the State of New York, it is submitted that the Courts of such State, following the public policy of that State, and in view of the North Carolina decision in *Tiffenbraun vs. Flannery*, 198 N. C. 397, would have applied the law of the forum holding under the facts of this case the North Carolina statute to be merely one of limitation and not a condition precedent and applied the New York State two-year limitation and would have denied the motion to dismiss.

We have seen that it is encumbent upon the Federal Court to ascertain and apply the law of New York State.

Erie Railroad Company vs. Tompkins, 304 U. S. 64.

In case that should ascertain that the law of New York State has not been enunciated with respect to a situation such as that here presented, then the Court could have deferred action until authoritative decision by the New York State Courts.

Motor Service vs. McLaughlin, 323 U. S. 101.

We respectfully submit that in view of the decision by the highest court in North Carolina in *Tiffenbraun vs. Flannery,* 198 N. C. 397, *treating the time limitation as a mere statute of limitations rather than a condition precedent under the circumstances of that case,* and the conflict of laws, that the state courts of New York State would in the case at bar, had it remained in those courts, construed the North Carolina limitation of one year as a mere statute of limitations and consequently would have applied the law of the forum, *i. e.,* the law of New York, to wit, the two-year statute contained in Section 130 of Decedent's Estate Law of that State.

The present policy of the State of New York is unmistakable. It considers the time limitation contained in death statutes as mere statutes of limitations.

Sharrow vs. Inland Lines, 214 N. Y. 101.

In the early days of death statutes following Lord Campbell's English Act, the Courts manifested a tendency to vary strict construction and almost invariably considered the time limitation as a condition precedent annexed to the cause of action. As the years passed and these statutes became commonplace the tendency has been liberalized and many states now treat the time limitation as a mere statute of limitations unless the language is so clear as not to admit of such construction. In *Sharrow vs. Inland Lines,* 214 N. Y. 101, the Court construed the limitation in the New York statute *as a mere statute of limitations.* The language of the New York statutes is much stronger against such a construction than is the North Carolina statute. The New York statute says "such an action *must* be commenced within two years after the decedent's death." The North Carolina statute does not use the word "must" but says that the action is "to be brought within one year after such death."

The New York Court of Appeals in the *Sharrow* case held that the time limitation in these statutes constitutes a mere statute of limitations unless the language is *specifically* that of a proviso, or such as cannot possibly be construed other than as a condition precedent. There can be no doubt when we examine and compare the New York statute with the North Carolina statute that the New York Court would construe the language of the North Carolina statute as merely constituting a statute of limitations. Moreover the North Carolina court *having under circumstances of conflict of law construed its own statute as a mere statute of limitations* the Court

of Appeals *would not be bound* to adopt the construction that it was a condition precedent because under certain other cases between citizens of North Carolina, the highest court of North Carolina had adopted that construction.

The construction of the North Carolina statute, had the case at bar remained in the New York State court, would have been exclusively for the New York State courts on the motion to dismiss, and it is respectfully submitted that the question to be determined here is what would the New York decision have been.

That the Court of Appeals has assumed the right where actions have been brought in New York State to recover for death caused in a foreign state to construe the death statute of the foreign state, is shown by the opinion of the Court in *Sharrow vs. Inland Lines,* 214 N. Y. 101, construing a previous Court of Appeals decision in *Johnson vs. Phoenix,* 197 N. Y. 316.

In *Johnson vs. Phoenix, supra,* the Court of Appeals had held that the one year limitation in a Canadian statute was a condition precedent and controlled the Court in New York State. The Judge writing for the Court in the *Sharrow* case, however, pointed out that the language of the Canadian statute was that the action was not only to be brought within a year "but *only* within a year." Judge Bartlett writing for the Court of Appeals said that the use of the *positive and exclusive phrase* "but only within a year" was decisive of an intention under the Canadian law not to permit any action under any circumstances after the year (108).

There is no provision either in the North Carolina or the New York statute analogous to those positive phrases that the action could be brought *but only* within the year. The fact that the Court of Appeals in the *Sharrow* case pointed out that it was the nature of that

language used in the Canadian statute that lead them to construe it as a condition precedent rather than a reference to any Canadian decisions, shows that that Court assumes the right to construe the effect of these foreign death statutes when the action is brought in New York State.

The case of *Schwertfeger, as admx., vs. Scandinavian American Line,* 186 App. Div. 89, affirmed 226 N. Y. 696, is in nowise contrary to the foregoing. In that case the Court of Appeals held a two year period in a New Jersey statute was a condition precedent. An examination of the record of the Court of Appeals shows that the question here presented was not there argued. It was conceded that the New Jersey statute was applicable on the facts of the case, but it was argued unsuccessfully that the time taken by a previous action in the Federal Courts should count. Undoubtedly the reason that the proposition here argued was not advanced or considered in that case was because of the language of the New Jersey statute. The New Jersey statute not only said that the action shall be commenced within two years after death but added the words *"and not thereafter."* See New Jersey Stat. Ann. 2:47. Obviously where a statute specifically states that under no circumstances shall the action be brought after the expiration of the period fixed, the statutory period must be construed as a condition precedent. There is no such analogous expression in either the New York State statute or the North Carolina statute.

When we turn from the decisions of the courts in New York State, hereinbefore referred to, and examine the statutes we find that *the broad and liberal policy of construction adopted by the Court of Appeals has been manifested also by very recent legislative enactments.* I refer here to Sections 13 and 55 of the New York Civil Practice Act heretofore quoted. It may be urged that

these sections having been inserted in the Civil Practice Act are intended to apply only generally with reference to the statute of limitations and not with reference to other general laws of the state such as Section 130, Decedent's Estate Law. We submit that the broad language of these acts show a legislative intention not to so limit them. Section 13 specifically states that where a cause of action originally accrued in favor of a resident of this state, *the time limited by the laws of this state shall apply.* That certainly applies in terms to the case at bar which was an action accruing in a foreign state in favor of a resident of the State of New York and the courts of New York State under the statute as well as under the construction heretofore enunciated by those courts have the right and power to give this plaintiff the benefit of the statute of limitations contained in Section 130, Decedent's Estate Law, just as much as the North Carolina Courts had the right to give the resident of that State in the *Tiffenbraun* case the benefit of the short North Carolina statute as against the longer Florida statute, where the death occurred.

Section 55, Civil Practice Act, heretofore quoted specifically says *an action may be brought in the New York State Courts within the time limited therefor by the laws of this State* and not thereafter and *that the time limited for bringing like actions by the place of residence of the defendant, or by the laws of the place of residence where the cause of action arose shall not apply.* That language is broad enough to show an intention to have it applicable to every action brought in the courts of the State of New York including an action to recover damages for negligence causing death.

Moreover in construing these sections of the Civil Practice Act it should be borne in mind that at the time of their enactment in New York, the Court of Appeals

in the *Sharrow* case had already declared that the time limitation in Section 130, Decedent's Estate Law was a mere statute of limitations and not a condition precedent. Therefore, in any event Sections 13 and 55 of the Civil Practice Act would be applicable to the cause of action created by the Decedent's Estate Law and to any similar action arising in a foreign state when suit would be brought in the State of New York.

The case of *Tonkonogoff's Estate*, 177 Misc. 1015, is not contrary to this argument. Surrogate Foley there uttered a dictum to the effect that Sections 13 and 55, Civil Practice Act were not applicable to the situation in the case before him where he said the right of action had been extinguished. However, that matter was not before the Surrogate as he was of the opinion that the claimant in the case before him was not a bona fide resident of the State of New York at any time. It is significant, however, that *after the decision of the Tonkonogoff case, which was decided in 1941, the legislature of the State of New York amended Sections 13 and 55 of the Civil Practice Act so as to specifically and expressly provide that in all such cases the time limited by the laws of New York State, and not by the law of a foreign state, should apply* (Chapter 506, Laws of 1943, in effect April 13th, 1943).

IV.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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